STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP685-CR
(Kenosha County Cir. Ct. Case No. 2009CF417)

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

LAMONT L. TRAVIS,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HON. WILBUR A. WARREN, III, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

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QUESTIONS PRESENTED

1. Whether a sentencing court's reliance on inaccurate information at sentencing, with the inaccuracy consisting of a mistaken belief that the sentence required a minimum period of five years of confinement, qualifies as a structural error requiring automatic reversal and therefore precludes the State from proving harmless error.

- By declaring the inaccuracy a harmless error, the circuit court necessarily rejected classifying the error as structural.

- The court of appeals classified the circuit court's mistaken belief as a structural error.

2. Whether, assuming the court of appeals correctly classified the error as structural, the remedy of resentencing complies with mandatory precedent requiring complete reversal of a structurally infected prosecution.

   - The circuit court did not decide this issue.

   - After classifying the error as structural, the court of appeals ordered resentencing only.

3. Whether, assuming harmless-error analysis applies to this error, this court should decide the harmless-error issue or should remand the issue to the court of appeals to decide.

   - This issue did not arise in the circuit court.

   - This issue did not arise in the court of appeals.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. Because the court granted the petition for review, the case merits oral argument.

Publication. The court's opinion, in developing Wisconsin law, will merit publication.

STATUTE INVOLVED[1]

WIS. STAT. § 948.02 SEXUAL ASSAULT OF A CHILD.

948.02 Sexual assault of a child. (1) FIRST DEGREE SEXUAL ASSAULT. (am) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.

(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.

(c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.

(d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.

(e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeat-

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2009-10 edition.

ed, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Criminal Complaint.

In a criminal complaint filed in early April 2009, the Kenosha County district attorney charged defendant-appellant Lamont L. Travis with one count of first-degree sexual assault of a child under the age of twelve:

> The above-named defendant on or about Tuesday, March 24, 2009, in the City of Kenosha, Kenosha County, Wisconsin, did Attempt to have sexual contact with a child under the age of twelve, TMG, DOB [redacted], contrary to sec. 948.02(1)(d),[2] 939.50(3)(b)[3] Wis. Stats., a attempted Class B Felo-

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[2] "Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs." Wis. Stat. § 948.02(1)(d).

[3] "Penalties for felonies are as follows: . . . (b) For a Class B felony, imprisonment not to exceed 60 years," Wis. Stat. § 939.50(3)(b), with a bifurcated sentence consisting of

(*footnote continues on next page*)

> ny, and upon conviction may be sentenced to a term of imprisonment not to exceed thirty (30) years.
>
> And furthermore, invoking the provisions of Wisconsin Statutes 939.616(2),[4] the defendant being 18 years of age or older at the time of the offense, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(1:1, Pet-Ap. 116 (footnotes added) (date of birth redacted).) The criminal complaint did not contain any allegations supporting the "use or threat of force or violence" element in Wis. Stat. § 948.02(1)(d).

B. Waiver Of Preliminary Hearing.

In late April 2009, Travis waived his preliminary hearing (26:2-4, Pet-Ap. 136-38). The prosecutor issued an information charging Travis with

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a maximum period of initial confinement of forty years, Wis. Stat. § 973.01(2)(b)1., and a maximum period of extended supervision of twenty years, Wis. Stat. § 973.01(2)(d)1. An attempt to commit first-degree sexual assault in violation of section 948.02(1)(d) reduces each of those periods by half. Wis. Stat. § 939.32(1m)(a)1. and (1m)(b).

4 "If a person is convicted of a violation of s. 948.02 (1) (d) or 948.025 (1) (c), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement." Wis. Stat. § 939.616(2).

the same crime identified in the criminal complaint:

> The above-named defendant on or about Tuesday, March 24, 2009, in the City of Kenosha, Kenosha County, Wisconsin, did Attempt to have sexual contact with a child under the age of twelve, TMG, DOB [redacted], contrary to sec. 948.02(1)(d), 939.50(3)(b) Wis. Stats., a attempted Class B Felony, and upon conviction may be sentenced to a term of imprisonment not to exceed thirty (30) years.
>
> And furthermore, invoking the provisions of Wisconsin Statutes 939.616(2), the defendant being 18 years of age or older at the time of the offense, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(8, Pet-Ap. 119 (date of birth redacted).)

C. Change Of Plea.

In early February 2010, Travis pled to the charge in the information. His plea questionnaire identified the charge as "Attempted SA of child 948.02" and confirmed that he understood that the penalty would include a mandatory minimum of five years of initial confinement (12:1, Pet-Ap. 122). In section 948.02, this mandatory minimum applies to only a violation of subsection (1)(d). *See* Wis. Stat. § 939.616(2).[5]

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[5] A mandatory minimum of twenty-five years applies to a violation of either subsection (1)(b) or subsection (1)(c). *See* Wis. Stat. § 939.616(1r).

At the change-of-plea hearing (31, Pet-Ap. 140-55), the circuit court reviewed the charge and confirmed that Travis understood it, including the mandatory minimum:

> THE COURT: . . . Apparently there's a minimum involved here also, Mr. Travis. Not only is it 20 years of initial confinement as a maximum, but apparently there's at least a five-year minimum period of incarceration.
>
> MR. TRAVIS: Yes, I understand, Your Honor.
>
> THE COURT: You understand that?
>
> MR. TRAVIS: Yeah.

(31:5, Pet-Ap. 144.)

> THE COURT: The way I read this, if you're convicted of it, you go to prison for at least five years. That's the minimum. Do you understand that?
>
> MR. TRAVIS: Yes, Your Honor.
>
> THE COURT: And you've discussed the possibility of a voluntary intoxication defense?
>
> MR. TRAVIS: Yes, Your Honor.
>
> THE COURT: And instead of that, when you don't remember the events of the night, you're going to enter a plea, take responsibility for this and perhaps go to prison for another five years?
>
> MR. TRAVIS: Yes. That's my understanding, yes, Your Honor.
>
> THE COURT: Okay. You've read the complaint here?

MR. TRAVIS: Yes.

THE COURT: And you're not contesting that what it says is true?

MR. TRAVIS: I know something happened. I know that. That's the only thing I can be sure of because my niece -- things changed. I know that. That's all I can tell you.

MR. ROSSELL [defense counsel]: This is a case, Your Honor, where I have gone through -- I haven't shown him the recorded statement due to his custodial status, but we did go through the --

THE COURT: There's a CAC?[6]

MR. ROSSELL: Yes. And I went through what she said during that CAC with him. I think early on I had offered to bring it in, but that was not something that he wanted to do. That was not something that -- Due to his custodial status, it makes it a little bit more difficult to get that into the jail.

THE COURT: Okay. But you're not questioning what your niece says?

MR. TRAVIS: No.

(31:6-8, Pet-Ap. 145-47 (footnote added).) The court also confirmed that Travis had read both pages of the plea questionnaire and had signed it (31:10, Pet-Ap. 149). In accepting the plea, the court stated: "A factual basis is gleaned from a reading of the complaint and the referenced con-

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6 "CAC" refers to Child Advocacy Center (9:1, Pet-Ap. 120).

text of the CAC tape[7] here which is further illustration of the conduct from the child's perspective. The Court is satisfied that the plea can be accepted with that factual basis" (31:12, Pet-Ap. 151 (footnote added)).

The plea also resolved two other cases (31:2, 13, Pet-Ap. 141, 152). As part of the plea agreement, the prosecutor dismissed *State of Wisconsin v. Lamont E. Travis*, Kenosha County Circuit Court Case No. 2008CF643, in which the State charged Travis with one Class H felony count of failing to update his sex-offender registration information, a violation of Wis. Stat. § 301.45(4)(a).[8] In addition,

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[7] *See* 9, Pet-Ap. 120-21 (stipulation and order regarding use of videotaped statements). Travis did not include the CAC tape in the appellate record.

[8] According to the Wisconsin Circuit Court Access (WCCA) online docket system (a component of the Consolidated Court Automation Programs (CCAP)), the circuit court granted the State's motion to dismiss No. 2008CF643 on February 1, 2010, the same day Travis entered his plea in this case.

Although ***State v. Bonds***, 2006 WI 83, 292 Wis. 2d 344, 717 N.W.2d 133, prohibits reliance on CCAP records to prove a fact beyond a reasonable doubt, ***id.*** ¶ 49, ***Bonds*** does not preclude a party or a court from using a CCAP record for purposes that do not require a reasonable-doubt level of certainty, *cf.* ***id.*** ¶ 49 n.12 ("We do not exclude the use of a CCAP report as a tool to facilitate a review with the defendant at sentencing of defendant's past history of criminal convictions."). *See also* ***In re Disciplinary Proceedings Against Phillips***, 2006 WI 43, ¶¶ 19-20, 67, 290 Wis. 2d 87, 713 N.W.2d 629 (supreme court approving and adopting findings of fact and conclusions of law in referee's report, which rested, in part, on review of CCAP records); ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶ 5 n.3,

(*footnote continues on next page*)

the prosecutor dismissed but read in the charges in *State of Wisconsin v. Lamont E. Travis*, Kenosha County Circuit Court Case No. 2008CM2317, in which the State charged Travis with two Class A misdemeanors (obstructing an officer and resisting an officer), both violations of Wis. Stat. § 946.41(1).[9]

D. Sentencing.

At the sentencing hearing (32, Pet-Ap. 156-86), the circuit court recited the charge and potential sentence, including the mandatory minimum, and confirmed Travis's understanding of that penalty:

> THE COURT: Good afternoon. The matter is here for sentencing. The charge is attempted first-degree sexual assault of a child under the age of 12. I would presume that the Class B that is reflected here would be the 30-year maximum term of confinement, bifurcated. There's a term of confinement, the prison portion of the bifurcated sentence, of not less than five years.
>
> MR. ROSSELL: Correct.

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318 Wis. 2d 216, 768 N.W.2d 53; ***Watton v. Hegerty***, 2007 WI App 267, ¶ 26 n.17, 306 Wis. 2d 542, 744 N.W.2d 619 (CCAP records "are public records of which [an appellate court] may take judicial notice"), *rev'd on other grounds*, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369. Here, the State relies on CCAP to confirm actions taken in related cases not part of Travis's appeal in this case.

[9] According to the WCCA online docket system, the circuit court granted the State's motion to dismiss and read in No. 2008CM2317 on February 1, 2010, the same day Travis entered his plea in this case.

> THE COURT: So there's a five-year minimum. You understood that at the time your plea was given?
>
> MR. TRAVIS: Yes, Your Honor.
>
> THE COURT: So the Court's got an obligation here if a sentence is to be imposed other than straight probation that it has to be at least five years. Do you understand that?
>
> MR. TRAVIS: Yes, Your Honor.

(32:2-3, Pet-Ap. 157-58.) The court imposed a consecutive sentence of imprisonment of eighteen years, consisting of eight years of initial confinement and ten years of extended supervision (32:29, Pet-Ap. 184; *see also* 18:1, Pet-Ap. 114).

E. Postconviction Motion For Resentencing.

In his postconviction motion (37, Pet-Ap. 124-34), Travis asserted a violation of due process because the circuit court erroneously believed the mandatory minimum applied to the offense he committed (37:3-5, ¶¶ 7-10, Pet-Ap. 126-28).[10] The

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[10] Travis also asserted a claim for a risk-reduction sentence under Wis. Stat. §§ 302.042 and 973.031 (37:6-7, Pet-Ap. 129-30). The circuit court denied this claim (41:16-18, Pet-Ap. 202-04). In the court of appeals, he did not challenge the court's decision on this claim and has therefore abandoned it. ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999) (appellate court deems issues raised in the trial court but not argued in a party's appellate brief as abandoned and not subject to appellate consideration), *distinguished on other grounds by State v. Popenhagen*, 2008 WI 55, ¶¶ 64-66, 309

(*footnote continues on next page*)

core of his claim rested on the contention that notwithstanding the ongoing and unchallenged recitation of section 948.02(1)(d) as the statute he violated, and notwithstanding the ongoing and unchallenged recitation of the applicability of the five-year minimum term of confinement applicable to that violation, he actually pled to a violation of section 948.02(1)(e), a statute to which the five-year minimum term of confinement does not apply. Hence, according to Travis, when the court referred at sentencing to the applicability of the five-year mandatory minimum, the court relied on inaccurate information. Further, according to Travis, the inaccurate information created structural error to which a mandatory (thus irrebuttable) presumption of prejudice attached, making harmless-error analysis irrelevant (37:5, ¶ 12, Pet-Ap. 128-29).

F. Motion Hearing.

At the motion hearing (41, Pet-Ap. 187-205),[11] Travis essentially reiterated the contentions in his

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Wis. 2d 601, 749 N.W.2d 611. The court of appeals did not discuss the risk-reduction claim. ***State v. Travis***, 2012 WI App 46, 340 Wis. 2d 639, 813 N.W.2d 702 (Pet-Ap. 101-12).

[11] By the time of the hearing, only Kenosha County Circuit Judge Wilbur A. Warren, III, had participated in all proceedings other than the initial appearance and the preliminary-hearing waiver. Three different lawyers had represented Travis, and seven assistant district attorneys (plus the district attorney on the criminal complaint) had represented the State:

- Attorney Charles Bennett represented Travis at the initial appearance (25:1); attorney Jason Alan

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motion (41:3-10, 12-13, Pet-Ap. 189-96, 198-99). The prosecutor stated that "[t]he information itself that was filed by the State is inaccurate, that there's a five-year minimum. There isn't" (41:11, Pet-Ap. 197). She continued:

> But you were the Judge who sentenced him so you can tell us if this was information that was relied upon. And he has a serious prior record. He has a prior sex assault conviction. And his prior sex assault conviction was an attempted second-degree sexual assault. He received eight years prison on that case so there's no reason why he wouldn't receive the same amount or greater in this case. I don't think there's any proof that that was because of the five-year minimum. And as Attorney Hagopian said, it would be a different story if the Court sentenced him to five years initial confinement and said, "I'm

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Rossell represented Travis from the preliminary-hearing waiver through sentencing (26:1; 32:1, Pet-Ap. 156); and Assistant State Public Defender Suzanne L. Hagopian represented Travis at the postconviction-motion hearing (41:1, Pet-Ap. 187).

- For the State, District Attorney Robert Zapf signed the criminal complaint (1:2, Pet-Ap. 117); Assistant District Attorney David Bayer appeared at the initial appearance (25:1); ADA Gregory Joseph appeared at the preliminary-hearing waiver (26:1); ADA Tracey L. Braun appeared at two adjournment hearings (27:1; 28:1); ADA Angelina Gabriele appeared at an adjournment hearing (29:1) and sentencing (32:1, Pet-Ap. 156); ADA Anson Kuriakose appeared at an adjournment hearing (30:1); ADA Patrick Anderson appeared at the change-of-plea hearing (31:1, Pet-Ap. 140); and ADA Annie Jay appeared at the postconviction-motion hearing (41:1, Pet-Ap. 187).

> doing this because there's a five-year minimum." That would be a different story. That's not what we have here.

(41:11, Pet-Ap. 197.)

G. Decision Denying Postconviction Motion.

The circuit court denied the motion (41:13-18, Pet-Ap. 199-204). The court said that "all parties now recognize [the five-year minimum] was inaccurately referenced beginning in the pleadings and carried out through the plea, the sentencing and ultimately really pervaded the entire file in this case" (41:13, Pet-Ap. 199). The court then denied the inaccurate-information claim:

> Did the Court rely on that mandatory minimum? And again, this ties in, I suppose, in some roundabout way with the prejudice argument here, but as far as the Court's perspective on this, in imposing an eight-year sentence, that sentence was primarily based, and the record should reflect this, not so much on the fact that there was a mandatory minimum perceived to be in place at the time but that there was, in fact, a substantial prior record involving, among other things, prior sexual assault-type offenses. And in our system of progressive type of consequences for similar criminal behavior, the Court typically, and I think this case was no different, would certainly consider that prior conduct as a substantial factor when it considers what an appropriate sentence should be in the instant case. So from the Court's perspective, the existence or nonexistence of a mandatory minimum sentence is of no consequence to this Court in its determination of what an appropriate sentence were. Had that been the case, the Court, I'm sure, would have indicated to the defendant that, "Because of the mandatory minimum and the existence of it and the Court's belief, I

> am going to give you five years which is the mandatory minimum here because the law requires that," and that certainly wasn't the case. As counsel points out and certainly the record reflects, this was an eight-year sentence of initial incarceration. And I don't think it's reasonable to suppose, nor can this Court support in any way, that the five-year mandatory minimum, which was believed to be in effect, had any bearing whatsoever on the imposition of the eight years of initial confinement. So that said, I believe the defense is correct in their position here that there should not have been a mandatory minimum. The defendant would not have been so informed had it not been pled and carried through as part of the plea proceeding, but the sentence would not have changed because of the existence or nonexistence of the mandatory minimum. So that error as it pervaded the entire file in this matter and the hearings that were held, that error I believe to be harmless because of the fact that it did not have any bearing on sentencing and was noted only to meet the statutory and case law requirements in informing the accused of what consequences are available, both maximum and minimum sentencing requirements.
>
> That said, I certainly accept the fact, Ms. Hagopian, that the error existed in the recitation of that mandatory minimum, but I believe in the final analysis at sentencing that the error was harmless with respect to the entire proceeding and the sentencing so the motion for resentencing at this point would be denied for those reasons.

(41:14-16, Pet-Ap. 200-02.) *See also* 32:23-30, Pet-Ap. 178-85 (circuit court's sentencing remarks and decision).

H. Parties' Contentions On Appeal.

On appeal, Travis renewed his contention that the inaccurate information qualified as structural error not susceptible to harmless-error analysis.

See generally Travis's Court of Appeals Brief and Travis's Court of Appeals Reply Brief.

The State argued that based on the posture of the case as it stood at the time of sentencing, the circuit court had not relied on inaccurate information because Travis had in fact pled to a violation of section 948.02(1)(d) — the only statute identifying the crime charged — rather than, by implication, to a violation of section 948.02(1)(e); Travis had acknowledged a sufficient factual basis for a plea under section 948.02(1)(d); and as of the time of sentencing, a valid and unchallenged plea to a violation of section 948.02(1)(d) remained in play, leaving the sentencing court entitled to regard the five-year mandatory period of confinement as accurate information bearing on the sentencing. The State also contended that because the error about which Travis complained traced back to the criminal complaint, the error provided a basis for seeking to withdraw his plea either directly via a plea-withdrawal motion or indirectly as a plea resulting from ineffective assistance of counsel. In addition, the State asserted that the structural-error doctrine did not apply to an inaccurate-information-at-sentencing claim because this court had already declared in ***State v. Tiepelman,*** 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, that harmless-error review applied to that kind of claim. *See generally* State's Court of Appeals Brief.

I. Court Of Appeals' Decision.

The court of appeals reversed the circuit court's decision. The appellate court declared that the circuit court's reliance on inaccurate information — the belief that the five-year mandatory period of confinement applied to the crime to which Travis

pled — constituted structural error, thus not susceptible to harmless-error analysis:

> The circuit court acknowledged that the error "really pervaded the entire file in this case." The error was not an isolated mistake that affected just a discretionary decision of the circuit court. The error infected the charging of Travis; the error infected the plea negotiations; the error infected Travis's discussions with his trial counsel; the error infected the plea hearing; and the error infected the sentencing of Travis, where all participants acted with the misunderstanding that the starting point for Travis was five years in prison. We agree with the circuit court that the error affected the entire framework within which Travis was prosecuted.
>
> We hold that the error affected the fairness, integrity, and the public reputation of the judicial proceedings. All participants operated under the assumption that Travis was going to prison for at least five years, when in reality there was no mandatory minimum sentence required. It is impossible to measure the breadth of the error. The error affected the State's charging decision, Travis's plea decision, communications and negotiations between the State and Travis, and the circuit court's basic assumptions as to Travis's sentence. Travis's due process right to be sentenced upon accurate information was violated. As the pervasive error seriously affected the fairness and integrity of Travis's sentence, we hold that it was a structural error requiring a reversal of the circuit court's denial of resentencing.

State v. Travis, 2012 WI App 46, ¶¶ 23-24, 340 Wis. 2d 639, 813 N.W.2d 702 (Pet-Ap. 111-12).

STANDARDS OF REVIEW

A. Inaccurate Information At Sentencing.

A defendant has a due process right to a sentence based on accurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶ 9. To prevail on an inaccurate-information-at-sentencing claim, a defendant must show the information's inaccuracy and that the circuit court actually relied on the information. ***Id.*** ¶ 26. "Proving inaccurate information is a threshold question — you cannot show actual reliance on inaccurate information if the information is accurate." ***State v. Harris***, 2010 WI 79, ¶ 33 n.10, 326 Wis. 2d 685, 786 N.W.2d 409. A defendant must establish by clear and convincing evidence that the circuit court actually relied on inaccurate information. ***Id.*** ¶¶ 4, 34.

An appellate court independently reviews whether the court imposed a sentence based on inaccurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶ 9. When reviewing a sentence, an appellate court looks to the totality of the sentencing court's remarks. ***State v. J.E.B.***, 161 Wis. 2d 655, 674, 469 N.W.2d 192 (Ct. App. 1991).

B. Harmless Error.

"Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647

N.W.2d 189) (footnote omitted). "[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[12] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶ 48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States,* 527 U.S. 1, 18 (1999)) (footnote added). *See also* ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording," citing *Neder*, 527 U.S. at 2-3; *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485; *Harvey*, 254 Wis. 2d 442, ¶ 48, n.14). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8 (citing *Harvey*, 254 Wis. 2d 442, ¶ 40). "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***Id.*** (citing *Tiepelman,* 291 Wis. 2d 179, ¶ 3).

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record, that the error complained of has affected the substantial rights of a party).

Harvey, 254 Wis. 2d 442, ¶ 47 n.12. *See* Wis. Stat. § 805.18 (harmless-error rule, made applicable to

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[12] ***Chapman v. California,*** 386 U.S. 18 (1967).

criminal proceedings by Wis. Stat. § 972.11(1)); ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (harmless-error test); *see also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***Stuart***, 279 Wis. 2d 659, ¶ 40 n.10 (various formulations of harmless-error test reflect "alternative wording"). The harmless-error test applies to claims of that a sentencing court relied on inaccurate information when imposing the sentence. ***Tiepelman,*** 291 Wis. 2d 179, ¶ 31.

SUMMARY OF THE STATE'S POSITION

Contrary to this court's decision in ***Tiepelman,*** 291 Wis. 2d 179, the court of appeals classified Travis's claim that the circuit court relied on inaccurate information at sentencing as a structural error (thus precluding an assessment for harmless error) rather than as a trial error subject to review for harmless error. Classifying inaccurate information at sentencing as structural error does not comport with the standards set out by the Supreme Court of the United States — standards to which Wisconsin courts adhere[13] — for determining whether to classify an error as a trial error or a structural error. Inaccurate information at sentencing does not satisfy any standard justifying characterization of the error as a structural error. This court should reverse the court of appeals' decision holding Travis's claim as setting out a structural error.

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[13] *See, e.g.*, ***State v. Martin***, 2012 WI 96, ¶¶ 43, 343 Wis. 2d 278, 816 N.W.2d 270; ***State v. Harris***, 2010 WI 79, ¶ 33 n.11, 326 Wis. 2d 685, 786 N.W.2d 409.

If this court accepts the court of appeals' structural-error conclusion as correct, this court should overturn the remedy. Mandatory precedents require complete reversal of a proceeding infected with structural error. Mere resentencing and amendment of the judgment of conviction (as the court of appeals ordered in this case) do not cure a structural error. The proper remedy would consist of vacating the judgment of conviction, vacating Travis's plea, and remanding the case to the circuit court so the criminal prosecution can resume at a point preceding the introduction of the structural error. Based on the court of appeals' opinion, the State regards that point as the filing of the criminal complaint. On remand, the district attorney would decide how to amend the criminal complaint to cure the structural defect the court of appeals traced to a defect in the complaint originally filed in this case.

If this court rejects the court of appeals' structural-error conclusion and accepts the State's position that the inacurate-information error qualified as trial error rather than structural error, this court should, in the interest of judicial economy, assess the error for harmlessness. The record suffices for this court to apply the harmless-error doctrine to the alleged sentencing error in this case.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS' DECISION RADICALLY EXPANDS THE STRUCTURAL-ERROR DOCTRINE, DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *TIEPELMAN*, AND LACKS ANY TETHER TO CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES AND BY WISCONSIN APPELLATE COURTS, THIS COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION AND REMOVE ANY DOUBT THAT THE HARMLESS-ERROR DOCTRINE APPLIES TO ALL CLAIMS THAT A SENTENCING COURT RELIED ON INACCURATE INFORMATION.

Both this court and the Supreme Court of the United States recognize the sharply limited application of the structural-error doctrine. The court of appeals in this case did not and therefore issued a decision in conflict with precedents from the Supreme Court and this court.

> In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." These include "most constitutional errors." The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." Such errors include the denial of counsel, the denial of the

> right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.

United States v. Gonzalez-Lopez, 548 U.S. 140, 148-49 (2006) (citations omitted) (footnote omitted).

> Structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," because the "entire conduct of the trial from beginning to end is . . . affected" by the error. In addition, structural errors "require automatic reversal" because they affect the "framework in which the trial proceeds, as opposed to errors in the trial process itself."

Winston v. Boatwright, 649 F.3d 618, 628 (7th Cir. 2011) (citations omitted). *See, e.g.*, ***Brecht v. Abrahamson,*** 507 U.S. 619, 629-30 (1993) (structural errors require "automatic reversal of the conviction because they infect the entire trial process"); ***United States v. Diaz-Jimenez***, 622 F.3d 692, 695 (7th Cir. 2010) ("The doctrine of harmless error is generally held inapplicable only to fundamental procedural errors (confusingly called 'structural' errors), such as refusing to allow a criminal defendant to be represented by a lawyer.").

"Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal." ***Washington v. Recuenco,*** 548 U.S. 212, 218 (2006) (footnote omitted).

> The subset of errors that mandate automatic reversal is a small one. It includes errors such as the complete denial of counsel, a biased judge, racial discrimination in the selection of the grand jury, the

> denial of self-representation, the denial of a public trial, and a defective reasonable doubt instruction. In contrast, errors such as the omission of an element of an offense do not necessarily defy harmless error review or affect the framework within which the trial proceeds, and are not grounds for automatic reversal.

United States v. Harbin, 250 F.3d 532, 543 (7th Cir. 2001) (citations omitted). *See also* ***United States v. Marcus***, 560 U.S. ___, 130 S. Ct. 2159, 2164 (2010) ("'structural errors' are 'a very limited class' of errors"); ***Johnson v. United States***, 520 U.S. 461, 468 (1997) (structural-error cases comprise a "very limited class of cases"); ***State v. Ford***, 2007 WI 138, ¶ 43, 306 Wis. 2d 1, 742 N.W.2d 61 (same). "[E]ven some structural errors, such as violations of the right to counsel, have been held to be subject to harmless error analysis, depending on the nature of the violation." ***Ashford v. Gilmore***, 167 F.3d 1130, 1137 (7th Cir. 1999). *See also* ***Recuenco,*** 548 U.S. at 218 n.2 (listing the six errors to which structural-error analysis applies); ***Arizona v. Fulminante,*** 499 U.S. 279, 309-10 (1991) (listing errors qualifying as "structural defect[s]" warranting automatic reversal); ***Hereford v. Warren***, 536 F.3d 523, 529 (6th Cir. 2008) (listing cases in which Supreme Court has found structural error); ***United States v. Lott***, 433 F.3d 718, 722-23 (10th Cir. 2006) (same); ***United States v. Rodriguez***, 406 F.3d 1261, 1268-70 (11th Cir. 2005) (Carnes, J., concurring in denial of rehearing en banc) (listing cases and discussing structural-error doctrine).

In effect, harmless-error analysis serves as the default decision-making framework for assessing the impact of error in a criminal proceeding, with

the "conclusion of structural error" flowing from "the difficulty of assessing the effect of the error." ***Gonzalez-Lopez***, 548 U.S. at 149 n.4. Thus, an error of constitutional magnitude must "defy harmless-error review" before a structural-error analysis applies. ***Neder v. United States,*** 527 U.S. 1, 8 (1999). *See also* ***Puckett v. United States,*** 556 U.S. 129, 141 (2009) (summarizing characteristics of errors recognized as structural and noting that "procedural errors at sentencing . . . are routinely subject to harmlessness review" (citing *United States v. Teague*, 469 F.3d 205, 209–210 (1st Cir. 2006))).

A claim that a court relied on inaccurate information at sentencing — the only claim Travis presented to the court of appeals — does not satisfy the standard for classification as structural error. Errors more serious and problematic than the one in Travis's case do not merit that classification. The omission of an element from a jury instruction — the closest analogy to a plea colloquy that omits reference to an element — does not create structural error. ***Neder,*** 527 U.S. at 15. "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." ***Recuenco,*** 548 U.S. at 222. For other examples, see ***Puckett,*** 556 U.S. at 140-41 (government's breach of plea agreement not a structural error); ***United States v. Olano,*** 507 U.S. 725, 738 (1993) ("outside intrusions upon the jury" amenable to harmless-error analysis, so not structural error); ***Rushen v. Spain***, 464 U.S. 114, 117-19 (1983) (classifying *ex parte* communication between judge and juror as trial error subject to harmless-error analysis, not as structural error subject to automatic reversal); ***Rodriguez***, 406

F.3d at 1268-70 (Carnes, J., concurring in denial of rehearing *en banc*) (listing types of structural errors requiring automatic reversal and types of errors subject to harmless-error analysis); ***Knox v. United States***, 400 F.3d 519, 523 (7th Cir. 2005) ("judicial resolution of a factual dispute that should have been presented to a jury is not a 'structural error' that requires automatic reversal"); ***Ford***, 306 Wis. 2d 1, ¶ 2 ("bailiff's contact with the crime victim is not structural error and does not require automatic reversal"); ***State v. Hansbrough***, 2011 WI App 79, ¶ 17, 334 Wis. 2d 237, 799 N.W.2d 887 ("the failure to provide the jury with a not guilty form for one of the five charged offenses did not constitute structural error").

In summary, review of a constitutional error defaults to harmless-error analysis, with an error's classification as a structural error occurring as a tightly constrained exception. *Cf.* ***United States v. Nance***, 236 F.3d 820, 825 (7th Cir. 2000) ("The list in *Neder* of errors not subject to harmless error analysis is a short one, as the Court itself emphasized."), *reh'g and reh'g en banc denied* (7th Cir. 2001).

The State does not dispute that in rare instances, errors at sentencing can qualify as structural error:

> Structural errors at sentencing include deprivation of counsel during the sentencing hearing itself, *see United States v. Salemo*, 61 F.3d 214, 221-22 (3d Cir. 1995), abdication of judicial role by authorizing a probation officer to determine the manner of restitution, *see United States v. Mohammad*, 53 F.3d 1426, 1438-39 (7th Cir. 1995), and in absentia sentencing,

see Hays v. Arave, 977 F.2d 475, 479-80 (9th Cir. 1992).[14]

United States v. Stevens, 223 F.3d 239, 244 (3d Cir. 2000) (footnote added). Those errors, however, share a notable characteristic: each error concerned a defect already recognized as a structural error — for example, complete denial of counsel during a critical stage of a criminal proceeding, ***United States v. Cronic***, 466 U.S. 648, 659 n.25 (1984), and "delegation of [a] serious sentencing decision from a judicial officer to another," an action previously classified under circuit case law as "a serious structural defect in the criminal proceedings," ***United States v. Mohammad***, 53 F.3d 1426, 1439 (7th Cir. 1995). Other than the court of appeals in this case, no court has, to the State's knowledge, classified reliance on inaccurate information at sentencing as a structural error.[15]

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[14] In ***Rice v. Wood***, 77 F.3d 1138 (9th Cir. 1996), the Ninth Circuit overruled ***Hays v. Arave***, 977 F.2d 475 (9th Cir. 1992). *See* ***Rice***, 77 F.3d at 1144 ("Rice's absence from the courtroom at the time the jury returned its verdict as to punishment, if it was constitutional error at all, *see* note 2 *supra*, was not structural error and is therefore subject to harmless-error analysis.").

[15] On October 7, 2012, the following search in the ALLCASES database on Westlaw retrieved 60 cases:

> op((((inaccurate incorrect false) /4 information) /p (sentenc! resentenc!)) & (structural-error fundamental-procedural-error))

Only one case — the court of appeals' opinion in this case — treated inaccurate information at sentencing as structural error. Moreover, like this court in ***State v. Tiepelman,*** 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, the Sixth Cir-

(*footnote continues on next page*)

Here, the court of appeals did so despite this court's explicit declaration of harmless error as the standard for resolving an inaccurate-information claim. ***Tiepelman,*** 291 Wis. 2d 179, ¶ 26 ("Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.").

In this case, neither the court of appeals nor Travis cited any authority suggesting that a sentencing court's reliance on inaccurate information creates structural error, even if a court could find the error's roots elsewhere in a proceeding. By making an inaccurate-information-at-sentencing claim, a defendant identifies a discrete error in a context that readily permits analysis for harmless error, not a structural error that, by definition, must defy harmless-error analysis.

This court recognized as much in ***Tiepelman,*** 291 Wis. 2d 179. In ***Tiepelman***, this court identified harmless error as the appropriate standard for assessing the impact of an inaccurate-information error. ***Id.*** ¶¶ 3, 26, 30, 31. In Travis's case, however, the court of appeals ignored this holding, citing ***Tiepelman*** for only the well-established proposition that a defendant has a due-process right to a sentence based on accurate information. ***Travis***, 340 Wis. 2d 639, ¶ 13 (Pet-Ap. 106-07). Instead, the court of appeals invoked a single case for the conclusion that inaccurate information at

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(*footnote continues from previous page*)

cuit rejected a claim that the sentencing court's reliance on inaccurate information constituted structural error. ***Stewart v. Erwin***, 503 F.3d 488, 501 n.4 (6th Cir. 2007).

sentencing can create structural error: ***Hansbrough***, 334 Wis. 2d 237. *See* ***Travis***, 340 Wis. 2d 639, ¶¶ 21-22 (Pet-Ap. 111). But in ***Hansbrough***, the court of appeals held that failing to provide the jury with a "not guilty" verdict form did not "infect[ ] the entire trial" and therefore did not qualify as structural error, ***Hansbrough***, 334 Wis. 2d 237, ¶ 17, and, "in the context of the entire trial proceedings," amounted to harmless error, ***id.*** ¶ 23. Other than providing the court of appeals with quotations about the difference between trial error and structural error, ***Hansbrough*** did not provide any basis — legal, logical, or practical — for classifying reliance on inaccurate information at sentencing as structural error in this case.

Travis's cited authority provided even less basis for the court of appeals' decision. In his postconviction motion, Travis asserted that "a misunderstanding of the applicable penalty is akin to a *structural error* for which prejudice is presumed. *See, e.g.,* ***State v. Smith,*** 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997) (prejudice presumed where state failed to make sentence recommendation called for by plea agreement)" (37:5, Pet-Ap. 128 (emphasis added)). He invoked ***Smith*** again in his appellate brief: "[I]n the context of sentencing, the supreme court has held that a prosecutor's material breach of the terms of the plea agreement is *structural error*." Travis's Court of Appeals Brief at 10 (emphasis added). He reiterated the point in his reply brief:

> Although structural errors are limited, they are not restricted to errors occurring at trial, as the state seems to suggest. Indeed, the error at issue in ***State v. Smith***, 207 Wis. 2d 258, 262-63, 558 N.W.2d 379 (1997), was an error *at sentencing*, spe-

> cifically, the prosecutor's sentence recommendation that breached the plea agreement. Yet, the *supreme court held the error was structural*, and, therefore, prejudice was presumed. ***Id.*** at 281-82.

Travis's Court of Appeals Reply Brief at 9 (first italicized emphasis in original; second italicized emphasis added).

Contrary to Travis's claim, ***Smith*** did not concern structural error. In 2001 (about nine and a half years before Travis filed his postconviction motion), this court wrote:

> In our analysis in *Smith*, however, we never directly addressed whether such breaches of plea agreements were encompassed within one of the presumption categories. Instead, we concluded that prejudice automatically occurs in such cases based on *Santobello v. New York*, 404 U.S. 257 (1971), a case similar to Smith's case in which the prosecutor had also breached a plea agreement. *Smith*, 207 Wis. 2d at 281-82. In *Santobello*, the Court held that, based on the interests of justice and on the duty of a prosecutor to keep promises to a defendant, any breach would result in remand to the circuit court, either for specific performance under the agreement or to permit the defendant to withdraw his plea. *Santobello*, 404 U.S. at 262-263. In *Smith*, we recognized *Santobello* as holding that a defendant has a substantive right to the prosecution's fulfillment of the terms of a plea agreement and that a breach, unobjected to by defense counsel, constituted a deprivation of that substantive right. *Smith,* 207 Wis. 2d at 278. Although *Santobello* was decided before *Strickland,* we noted that it relied on similar principles of fairness. *Id.* at 276.

State v. Franklin, 2001 WI 104, ¶ 20, 245 Wis. 2d 582, 629 N.W.2d 289. Moreover, in 2009 (a day more than twenty-two months before Travis

filed his postconviction motion), the Supreme Court wrote:

> *Santobello* did hold that automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved, but that holding rested not upon the premise that plea-breach errors are (like "structural" errors) somehow not *susceptible,* or not *amenable,* to review for harmlessness, but rather upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining — an "essential" and "highly desirable" part of the criminal process, 404 U.S., at 261-262. But the rule of contemporaneous objection is equally essential and desirable, and when the two collide we see no need to relieve the defendant of his usual burden of showing prejudice. See *Olano, supra*, at 734.

Puckett, 556 U.S. at 141 (footnote omitted) (emphases in original).

Smith thus did not rest on a constitutional error, much less declare the error structural. Rather, ***Smith*** rested on a Supreme Court policy choice to protect the plea-bargaining process.

In short, neither the court of appeals nor Travis pointed to (or could point to) any authority supporting the dramatic expansion of the structural-error doctrine to embrace the discrete error of a court's reliance on inaccurate information at sentencing — the error specified by Travis in his postconviction motion and an error readily "susceptible" or "amenable" to harmless-error analysis, as this court recognized in ***Tiepelman***.

II. IF THE STRUCTURAL-ERROR DOCTRINE CONTROLS THIS CASE, THE REMEDY CONSISTS NOT OF REMAND FOR RESENTENCING, BUT OF COMPLETE REVERSAL OF THE JUDGMENT OF CONVICTION AND A REMAND FOR THE CASE TO RETURN TO THE POINT ALLOWING THE DISTRICT ATTORNEY TO FILE AN AMENDED CRIMINAL COMPLAINT.

A structural error requires a complete reversal, especially when the error, as described by Travis and the court of appeals in this case, originates in the criminal complaint and runs unbroken through sentencing. Assuming the court of appeals correctly classified the error as structural, the court's remedy fails to comply with mandatory precedent requiring reversal of the entire proceeding, not just remand for resentencing.

As shown in the principles and examples applicable to a determination of an error as structural (pp. 22-26, above), a true structural error requires automatic reversal of not just a sentence, but of the entire proceeding, with the parties returned to the point at which the error began infecting the proceeding. *See, e.g.*, ***Winston***, 649 F.3d at 628 ("Structural errors are 'defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards,' because the 'entire conduct of the trial from beginning to end is . . . affected' by the error." (quoting *Fulminante,* 499 U.S. at 309-10)).

Here, the court of appeals identified the criminal complaint as the point at which the error began infecting the proceedings. ***Travis***, 340 Wis. 2d

639, ¶ 23 (Pet-Ap. 111).[16] Under well-established precedent defining structural error (pp. 22-26, above), mere resentencing cannot cure a structural-error infection so deeply embedded. The court of

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[16] In the State's view, the criminal complaint can serve as the starting point only by ignoring the change-of-plea hearing itself. A defendant must challenge the sufficiency of a criminal complaint before a preliminary hearing or waiver of the hearing. Wis. Stat. § 971.31(5)(c). Here, Travis waived his preliminary hearing (26, Pet-Ap. 135-39), thus also waiving any challenge to the sufficiency of the allegations in the complaint. Travis also did not object to the sufficiency of the criminal complaint before tendering his guilty plea, thus waiving a second time any challenge to the sufficiency of the criminal complaint. ***State v. Bonds***, 161 Wis. 2d 605, 610, 469 N.W.2d 184 (Ct. App.) (where "averments in the criminal complaint may not have supported the specific charge," defect waived by failure to object before entering guilty plea), *rev'd on other grounds*, 165 Wis. 2d 27, 477 N.W.2d 265 (1991); *cf.* Wis. Stat. § 971.31(2) ("defenses and objections based on . . . insufficiency of the complaint, information or indictment . . . shall be raised before trial by motion or be deemed waived").

At the change-of-plea hearing, the court found a factual basis in both the criminal complaint and a CAC videotaped interview of the victim (31:12, Pet-Ap. 151; *see also supra* note 6), not just in the criminal complaint. If a structural error arose, therefore, the error began with the change-of-plea hearing and must rest on a contention that the circuit court erred when it relied on both the criminal complaint and the CAC videotape as the basis for Travis's plea to the charge identified in the information: a violation of Wis. Stat. § 948.02(1)(d), not of Wis. Stat. § 948.02(1)(e). The record does not provide any basis for holding that the circuit court erred. If the circuit court did not err in finding a factual basis, however, the court also did not rely on inaccurate information at the sentencing, and structural error could not have occurred at any point.

appeals had an obligation to remand the case with instructions to return the case to the point at which the State filed the criminal complaint.[17] Then the prosecutor can decide how to amend the complaint, whether by changing the statutory reference or by revising the statement of facts to include an allegation sufficient to merit a charge under the current statutory reference.

In effect, under structural-error precedent, neither Travis nor the court of appeals can have it both ways — an error classified as structural followed by a nonstructural remedy addressing only a portion of the fully infected proceeding. The error and the remedy must match. Here, the error and remedy fundamentally misalign. If this court agrees with Travis and the court of appeals that the record shows a structural error, this court should affirm that part of the decision but overturn the remedy.

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[17] If Travis actually believed a structural error existed from the inception of the case, he should have filed a plea-withdrawal motion or a motion claiming ineffective assistance of counsel at the preliminary hearing, the change-of-plea hearing, and the sentencing hearing. Mere resentencing does not cure a structural error that allegedly traces all the way to the criminal complaint and runs through sentencing.

III. If This Court Concludes (As It Should) That The Structural-Error Doctrine Does Not Govern This Case, The Court Should Decide The Harmless-Error Issue.

In ***Tiepelman,*** 291 Wis. 2d 179, this court opted not to decide the harmless-error issue because the court accepted the parties' stipulation "that the issue of harmless error was not developed to the degree necessary to assist this court in resolving that issue." ***Id.*** ¶ 31. Here, the record contains a sufficiently developed harmless-error analysis by the circuit court and by the parties. Assuming this court agrees with the State that the error about which Travis complains did not amount to structural error, this court should conserve judicial resources by deciding the harmless-error issue rather than relegate the task to the court of appeals on a remand. Under the standards for assessing harmless error (pp. 18-20, above), the circuit court's reliance on any alleged inaccurate information did not cause Travis any harm.

The circuit judge who sentenced Travis also presided over the postconviction-motion hearing (32:1, Pet-Ap. 156; 41:1, Pet-Ap. 187). At the hearing on the postconviction motion (41, Pet-Ap. 187-205), the judge said he did not regard the mandatory-minimum sentence as affecting the sentence he imposed (41:14-16, Pet-Ap. 200-02; *see also* pp. 14-15, above (quoting judge's explanation)).

Although this court need not accept the circuit judge's assertion as dispositive,[18] the sentencing transcript provides sufficient reason to accept the judge's declaration. At the sentencing, the judge focused on Travis's extensive juvenile and criminal record (32:23-26, 28, Pet-Ap. 178-81, 183), a record not offset by the positive activities for which the court gave credit (32:27, Pet-Ap. 182). In particular, the judge noted Travis's previous sexual offense (32:25, Pet-Ap. 180). Although the judge referred twice to the mandatory-minimum sentence when reciting the circumstances of the crime and penalty (32:2-3, Pet-Ap. 157-58; *see also* 32:24, Pet-Ap. 179), the remainder of the judge's sentencing remarks makes clear that Travis would have received the same sentence even without reference to a mandatory-minimum sentence. This court should, therefore, affirm the circuit court's decision that any reliance on the mandatory-minimum sentence did not affect the sentence the court imposed.

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[18] *See* ***State v. Groth***, 2002 WI App 299, ¶ 28, 258 Wis. 2d 889, 655 N.W.2d 163 ("A postconviction court's assertion of non-reliance on allegedly inaccurate sentencing information is not dispositive. We may independently review the record to determine the existence of any such reliance." (citation omitted)), *modified on other grounds by Tiepelman*, 291 Wis. 2d 179.

CONCLUSION

For the reasons offered in this brief, this court should reverse the decision of the court of appeals and reinstate Travis's judgment of conviction.

Date: October 10, 2012.

Respectfully submitted,

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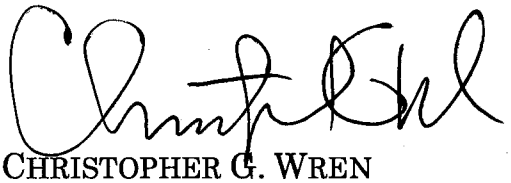
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 8,240 words.



CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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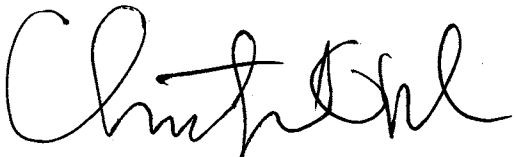

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(2)(a): APPENDIX

In accord with Wis. Stat. § (Rule) 809.19(2)(b), I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a). The appendix contains: (1) a table of contents; (2) the findings or opinion of the circuit court, along with the opinion of the court of appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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